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Mississippi Supreme Court Holds Pollution Exclusion Ambiguous

23 Feb 2022

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In a decision issued on January 20, 2022, the Mississippi Supreme Court held that a pollution exclusion contained in a general liability policy was ambiguous with respect to a claim for coverage by an insured for a damage caused by an explosion. The court deemed the terms "contaminant" and "irritant" within an absolute pollution exclusion ambiguous in an insurance coverage dispute involving an explosion caused by welding a tank containing stickwater, a food manufacturing by product.

In *Omega Protein, Inc. v. Evanston Ins. Co*., the Mississippi Supreme Court was asked to decide whether stickwater, a byproduct of the fish meal and fish oil production process, was a "pollutant" within the purview of an absolute pollution exclusion contained in a commercial general liability policy ("CGL"). No. 2020-CA-01097-SCT, 2022 WL 178171, at *4 (Miss. Jan. 20, 2022). The underlying dispute arose from an explosion at a food manufacturing facility owned by the insured Omega Protein Inc. ("Omega") where a contractor hired by Omega was performing welding and other fabrication work on a tank temporarily housing stickwater. *Id*. at *2–4. The explosion resulted in one death and several injuries. *Id*. Omega sought coverage under the contractor's CGL and umbrella policies as an additional insured after the decedent's estate filed suit against Omega contending that the explosion was caused by the ignition of flammable gases inside the stickwater storage tank. *Id*. at *1. The contractor's primary CGL carrier, Colony, filed a declaratory judgment action seeking a declaration of no coverage for bodily injury based on the pollution exclusion in its policy. Evanston, the excess umbrella carrier, intervened and denied coverage, based on among other things, a substantially similar pollution exclusion in its policy. *Id*.

Although Colony eventually resolved its dispute with Omega, Evanston continued to maintain that coverage was unavailable pursuant to its pollution exclusion, which precluded coverage for losses "arising out of or contributed to in any way by the actual, alleged or threatened discharge, dispersal, release, migration, escape, or seepage of pollutants." *Id*. at *2. The policy defined the term "pollutants" as "any solid, liquid, gaseous, or thermal irritant or contaminant including smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste." *Id*. The dispute centered on whether the gasses emitted by the stickwater were an "irritant or contaminant" under the pollution exclusion. *Id*. The trial court ruled granted summary judgment in favor of Evanston and Omega appealed.

The Mississippi Supreme Court reversed the trial court's ruling in favor of Evanston, holding that the pollution exclusion was ambiguous and, pursuant to Mississippi law, construed the ambiguity in favor of Omega. *Id*. at 3. Referring to dictionary definitions of the terms "contaminant" and "irritant," the court determined that each were susceptible to more than one meaning. The court reasoned that while a substance can be an irritant or contaminant by its very nature, a substance may not necessarily be one "until it comes into contact with something and is actively irritating or contaminating it." *Id*. Using crude oil as an example, the court observed that crude oil could be considered a contaminant not only by its nature, but also when it comes into contact with water or wildlife. *Id*. Accordingly, the court concluded the terms to be ambiguous and construed coverage in favor of Omega. The court separately upheld the trial court's determination that Omega qualified as an additional insured under Evanston's policy. *Id*. at 4.

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